

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FILED/ACCEPTED

MAR 17 2008

Federal Communications Commission  
Office of the Secretary

In the Matter of	)	EB Docket No. 07-147
	)	
PENDLETON C. WAUGH, CHARLES M.	)	File No. EB-06-IH-2112
AUSTIN, and JAY R. BISHOP	)	NAL/Acct. No. 200732080025
	)	
PREFERRED COMMUNICATION	)	FRN No. 0003769049
SYSTEMS, INC.	)	
	)	
Licensee of Various Site-by-Site Licenses in	)	
the Specialized Mobile Radio Service.	)	
	)	
PREFERRED ACQUISITIONS, INC.	)	FRN No. 0003786183
	)	
Licensee of Various Economic Area Licenses	)	
in the 800 MHz Specialized Mobile Radio	)	
Service	)	

To: The Honorable Judge Arthur I. Steinberg

**ENFORCEMENT BUREAU'S**  
**REQUEST FOR LEAVE TO FILE CONSOLIDATED REPLY TO**  
**RESPONSES TO MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS**

The Enforcement Bureau ("Bureau") herein seeks leave, pursuant to 47 C.F.R. § 1.294 and 1.325, to reply to responses to the Enforcement Bureau's motions to compel production of documents from Preferred Communications Systems, Inc. ("PCSI"), Preferred Acquisitions, Inc. ("PAI"), and Charles M. Austin ("Austin") (collectively, "Respondents"). In support hereof, the Bureau states as follows:

1. On or about February 19, 2008, the Bureau served a Motion to Compel Document Production and Interrogatory Answers from PCSI, Motion to Compel Document Production and Interrogatory Answers from PAI, and Motion to Compel

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Document Production and Interrogatory Answers from Austin (collectively, “Motions to Compel”).

2. On March 6, 2008,<sup>1</sup> Respondents each filed a “Response to the Enforcement Bureau’s Motion to Compel Re Document Production,” but only with respect to the Bureau’s requests for production of documents (hereinafter, the “Document Requests”). These pleadings will hereinafter be referred to collectively as the “Responses.”

3. The Responses are replete with inaccuracies concerning their obligations to comply with discovery rules and concerning the Bureau’s positions on the Respondents’ noncompliance. The Bureau respectfully submits that the attached Consolidated Reply to the Responses outlines areas in which the record would better benefit from the clarifications that the Bureau provides therein.

4. Also, the Bureau sees no additional prejudice to the Respondents from allowing the Bureau the leave to file the attached pleading. The Bureau spoke with the Respondents’ counsel on March 7, 2008, and counsel raised no objection to the Bureau filing a reply to the Responses.

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<sup>1</sup> These parties’ oppositions to the PCSI Motion, PAI Motion, and Austin Motion were due on March 10, 2008 pursuant to an agreed-upon extension. Thus, these filings were timely.

5. Accordingly, the Bureau respectfully requests that the Presiding Judge consider the attached Consolidated Reply to Responses to Motions to Compel Production of Documents and issue an order providing the relief sought therein. Specifically, the Bureau respectfully requests that the Presiding Judge overrule the Respondents' objections to the Bureau's Document Requests and compel the Respondents to produce responsive documents immediately.

Respectfully submitted,  
Kris Anne Monteith  
Chief, Enforcement Bureau

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line that curves upwards and to the right.

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March 17, 2008

## **ATTACHMENT**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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To: The Honorable Judge Arthur I. Steinberg

**ENFORCEMENT BUREAU'S CONSOLIDATED REPLY TO  
RESPONSES TO MOTIONS TO COMPEL PRODUCTION OF DOCUMENTS**

The Enforcement Bureau ("Bureau") herein replies, pursuant to 47 C.F.R. §§ 1.294 and 1.325, to responses to the Enforcement Bureau's motions to compel production of documents from Preferred Communications Systems, Inc. ("PCSI"), Preferred Acquisitions, Inc. ("PAI"), and Charles M. Austin ("Austin") (collectively, "Respondents"). In support hereof, the Bureau states as follows:

1. On or about February 19, 2008, the Bureau served a Motion to Compel Document Production and Interrogatory Answers from PCSI ("PCSI Motion"), Motion to Compel Document Production and Interrogatory Answers from PAI ("PAI Motion"), and Motion to Compel Document Production and Interrogatory Answers from Austin ("Austin Motion") (collectively, "Motions to Compel").

2. On March 6, 2008,<sup>1</sup> Respondents each filed a “Response to the Enforcement Bureau’s Motion to Compel Re Document Production,” but only with respect to the Bureau’s requests for production of documents (hereinafter, the “Document Requests” or “Requests”). These pleadings will hereinafter be referred to individually as the “PCSI Response,” the “PAI Response,” or the “Austin Response,” and collectively, as the “Responses.”

**A. Respondents’ Responses Were Improperly Commingled by Party and By Request.**

**1. Respondents Failed to Identify Which Party Produced Which Documents.**

3. In the Responses, Respondents contend that their failure to connect the Document Requests with the documents produced should raise no concerns with the Bureau or the Court. Respondents claim that they met their responsive obligations by inserting dividers bearing the label “Preferred Communication Systems” within a 6,600-page document production. Respondents’ “labeling” falls short of meeting their obligations.

4. Despite their representations to the contrary in the Responses, Respondents failed to identify which documents came from which Respondent. Respondents submitted an improperly commingled response. The Bureau separately requested documents from each Respondent.

5. In response to the Bureau’s Motions to Compel, Respondents assert that because their affairs are so intertwined, it is ostensibly impossible for them to separately

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<sup>1</sup> These parties’ oppositions to the PCSI Motion, PAI Motion, and Austin Motion were due on March 10, 2008 pursuant to an agreed-upon extension. Thus, these filings were timely.

produce documents.<sup>2</sup> Even were this a tenable position, the failure of Respondents to provide a reasonable system of organizing their responses has had the effect of delaying this proceeding. By way of example, accepting Respondents' current position that all documents were produced by PCSI (see PCSI Response at 2) as true, when producing the documents, PCSI could have sorted them or otherwise identified to which of the Bureau's Document Requests those documents responded. If such documents actually duplicated what PAI and Austin were asked to produce (as they contend is the case), they could have referenced which of the already-produced materials responded to the specific Document Requests at issue. Instead, Respondents delayed the Bureau's discovery by seemingly collectively submitting 6,600 pages in no particular order and without any index, when the Document Requests are directed to three separate parties.

**2. Respondents Failed to Identify Which Documents Responded to Which Request.**

6. Additionally, as briefly referred to above, neither the responsive documents submitted nor the Responses provided delineate which documents are responsive to which Request. Respondents have effectively derailed the Bureau's efforts and delayed these proceedings by responding in such an untimely<sup>3</sup> and obscure manner. As a result, the Bureau has had no choice but to sift through the documents, and attempt

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<sup>2</sup> See PCSI Response at 2 ("Patently, all of the documents produced were produced by PCSI, because PCSI is PAI's parent and therefore owns all PAI document, and anything Austin possesses in his capacity as president of PCSI is the property of PCSI, not Austin") (emphasis omitted); PAI Response at 2 (same); Austin Response at 2 (same).

<sup>3</sup> As outlined in the Bureau's Motion to Compel against each of the Respondents, the Respondents have sought numerous extensions in submitting their discovery responses and even upon submitting them, the answers are incomplete and replete with meritless objections. See Enforcement Bureau's Motion to Compel Document Production and Interrogatory Answers from Preferred Communication Systems, Inc., at 1-4 (filed Feb. 19, 2008) ("PCSI Motion"); Enforcement Bureau's Motion to Compel Document Production and Interrogatory Answers from Preferred Acquisitions, Inc., at 1-4 (filed Feb. 19, 2008) ("PAI Motion"); Enforcement Bureau's Motion to Compel Document Production and Interrogatory Answers from Charles M. Austin, at 1-4 (filed Feb. 19, 2008) ("Austin Motion").

to determine: (1) which Request, if any, they respond to; (2) whether the documents are, in fact, responsive; and (3) which Request(s) are still outstanding.

7. Accordingly, the Bureau respectfully submits that the Presiding Judge should reject the contentions raised in subpart A of each of the Responses, overrule Respondents' objections, and compel them to produce responsive documents.

**B. Respondents' Overbroad, Erroneous Excuses for Failing to Produce Documents Purportedly in the Bureau's Possession Lack Precedential Support.**

8. Respondents admit they are withholding an undefined number of responsive documents. Respondents claim such withholding is appropriate because the documents in question are duplicative of documents purportedly already in the Bureau's possession.<sup>4</sup>

9. Each Respondent raised the above-described general objection in response to the Bureau's Document Requests. Respondents' objections and arguments should be rejected as overly broad, lacking precedential support, and, to put it simply, wrong. The objections are overbroad because Respondents fail to specify which documents are being withheld as duplicative. Without this information there is no way to test the merit of the objections. Respondents' objections should also be overruled because they fail to cite any precedent in support of their position. As the Presiding Judge has previously found in relation to document production: "[t]he fact that the production of these documents may be time consuming, difficult, or require a great deal of work does not excuse [the Respondents] from their obligation to produce them."<sup>5</sup> When raising these objections responding to the Bureau's Motions to Compel, Respondents fail to provide any

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<sup>4</sup> See PCSI Response at 3-4; PAI Response at 3-4; Austin Response at 3-4.



justification, legal or otherwise, for their failure to produce the responsive documents. In light of the foregoing, the Bureau respectfully requests that these objections be overruled.

10. Respondents also claim that the Bureau concedes that such objections are correctly asserted.<sup>6</sup> The Bureau did no such thing. In the Motions to Compel, the Bureau specifically asked that these objections be overruled. In its Motions, the Bureau also demonstrated how the requested materials are relevant to the issues designated in the proceeding.<sup>7</sup> As a result, the Bureau demonstrated that its need for the requested documents outweighs Respondents' vague and unsubstantiated assertions of burden resulting from the alleged reproduction of documents.<sup>8</sup> The Bureau also noted that Respondents' basis for objection was insufficient.<sup>9</sup> The Bureau did not concede that Respondents' objections are appropriate.

11. In light of the foregoing, the Bureau respectfully requests that the Presiding Judge reject Respondents' assertions in subpart B of each of the Responses, overrule their objections, and compel them to produce the responsive documents.

**C. The Presiding Judge Should Reject Respondents' Arguments Regarding Documents on File with the Commission.**

12. Respondents contend that they are under no obligation to produce material purportedly already on file with the Commission.<sup>10</sup> While the Commission may have some of the requested documents in its possession, it is unlikely that it has all such documents that the Bureau is seeking in its Document Requests. In any event, the

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<sup>5</sup> See *NOS Communications, Inc., et al.*, Memorandum Opinion and Order, FCC 03M-034, at 2 (ALJ Steinberg, rel. Aug. 25, 2003).

<sup>6</sup> See PCSI Response at 4; PAI Response at 3-4; Austin Response at 3-4.

<sup>7</sup> See PCSI Motion at 4-9; PAI Motion at 4-9 (filed Feb. 19, 2008) ("PAI Motion"); Austin Motion at 4-9 (filed Feb. 19, 2008) ("Austin Motion").

<sup>8</sup> See *supra*, note 8.

<sup>9</sup> See *id.*

<sup>10</sup> See PCSI Response at 4; PAI Response at 4; Austin Response at 4

Respondents do not explain why responding to Document Requests requesting such information would be burdensome. Their claims are bare and unsupported. As the Bureau argues in its Motions to Compel, incorporated herein by reference, the requested materials have a direct bearing on issues set for hearing.<sup>11</sup> Clearly, information about the Respondents' filings with the Commission and the representations therein are legitimate areas of inquiry. Accordingly, the Bureau respectfully requests that the Presiding Judge overrule Respondents' objections and compel them to produce the responsive documents.

**D. Respondents Have Failed to Substantiate Their Claims Regarding Post-Designation Documents.**

13. Respondents have and continue to refuse to produce responsive material created after designation of this hearing.<sup>12</sup> In a seemingly arbitrary and self-serving fashion, Respondents allege that such material is irrelevant, duplicative of information in older documents, or protected by work product doctrine and/or attorney-client privilege.<sup>13</sup>

14. In its Motions to Compel, incorporated herein by reference, the Bureau asserts the generally accepted principle that claims of privilege cannot lie without some identification of the document in question and the specific privilege asserted.<sup>14</sup> To meet this burden, the party asserting privilege should create and produce a privilege log. The Bureau respectfully submits that it is impossible to ascertain whether Respondents' assertions of privilege are legitimate without, at the very least, an identification of the documents and enumeration of which privilege(s) Respondents purport to apply to shield

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<sup>11</sup> See PCSI Motion at 4-6; PAI Motion at 4-6; Austin Motion at 4-6.

<sup>12</sup> See PCSI Motion at 4-5; PAI Motion at 4-5; Austin Motion at 4-5.

<sup>13</sup> See *supra*, note 13.

<sup>14</sup> See *supra*, Sections B-C (refuting that materials may be omitted from production simply because they supPLICATE material already in the Bureau's possession or on file with the Commission); PCSI Motion at 4-10 (refuting PCSI's objections to producing post-designation material); PAI Motion at 4-9 (refuting same as to PAI); Austin Motion at 4-9 (refuting same as to Austin).

them from discovery. Respondents purport that such identification is also privileged.<sup>15</sup> This assertion is clearly dilatory and without merit.

15. Accordingly, the Bureau respectfully requests that the Presiding Judge reject Respondents' contentions (in subpart D of each of the Responses), overrule Respondents' objections, and order Respondents to produce responsive documents. In the alternative, the Bureau respectfully submits that because Respondents failed to properly assert these privileges, the Presiding Judge should, at the minimum, order them to identify such materials in a privilege log.

**E. Respondents' Objections Regarding Overbreadth Must Be Overruled.**

16. Respondents claim that the Requests are overbroad in an attempt to justify their failure to produce responsive documents.<sup>16</sup> The Bureau's Motions to Compel and the arguments set forth in this Reply have amply demonstrated that the Bureau's Document Requests are not overbroad.<sup>17</sup>

17. Accordingly, for the reasons discussed in Sections A-D above, as well as in its Motions to Compel, incorporated herein by reference, the Bureau respectfully submits that the Presiding Judge should reject the arguments in subpart E of each of the Responses.<sup>18</sup> The Bureau also respectfully requests that the Presiding Judge overrule Respondents' objections and order Respondents to produce responsive documents.

18. Puzzlingly, in the same subpart of their respective briefs, subpart E, Respondents also refer to their stipulation with the Bureau to turn over segments of documents from counsel's prior representation of Respondents. The Bureau has not and

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<sup>15</sup> See PCSI Response at 4-5; PAI Response at 4-5; Austin Response at 4-5

<sup>16</sup> See PCSI Response at 6-7; PAI Response at 5-6; Austin Response at 5-7.

<sup>17</sup> See, *supra*, Sections A-D; PCSI Motion at 4-9; PAI Motion at 4-9; Austin Motion at 4-9.

<sup>18</sup> See, *supra*, note 18.

does not dispute that such a stipulation exists. Notwithstanding this stipulation, Respondents concede that there are responsive documents in their possession, custody, or control that have not been produced.<sup>19</sup>

**F. Respondents' Objections Regarding Producing Federal Income Tax Returns Must Be Overruled.**

19. Respondents continue to contend that they need not produce tax returns as requested by the Bureau.<sup>20</sup> Respondents asserted this objection and raised their arguments in support on prior occasions. Respondents' Responses raise no new arguments in support of their objections.

20. The Bureau notes that in *NOS Communications, Inc.*, the Presiding Judge rejected the Bureau's requests for other parties' tax returns.<sup>21</sup> In so ruling, the Presiding Judge found that the requested tax returns were irrelevant to the designated issues or that the information sought was provided elsewhere.<sup>22</sup>

21. The Bureau respectfully submits that this case is distinguishable from *NOS Communications*.<sup>23</sup> In the instant case, the issues set for hearing encompass Respondents' finances such that financial documents sought are relevant. For example, one issue set for hearing is whether the licensees at issue misrepresented PAI's operational readiness to the Commission.<sup>24</sup> For this issue, PAI's and its parent company,

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<sup>19</sup> As they admit, Respondents held back documents that they classified as already produced to the Bureau, publicly available in the Commission's files, and documents created after hearing designation. See PCSI Response at 6; PAI Response at 6; Austin Response at 6.

<sup>20</sup> See PCSI Response at 7; PAI Response at 7; Austin Response at 7.

<sup>21</sup> See, *supra*, note 6.

<sup>22</sup> See *id.*

<sup>23</sup> In *NOS Communications*, the issues set for hearing included: whether a common carrier had conducted a misleading marketing campaign; whether its operating authority should be revoked; and whether its principals should be ordered to cease and desist providing common carrier services. See *NOS Communications, Inc., et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 18 FCC Rcd 6952, 6965 (2003).

<sup>24</sup> See *Pendleton C. Waugh, et al.*, Order to Show Cause and Notice of Opportunity for Hearing, 22 FCC Rcd. 13363, at 13668-69, 13376-80, 13385 (2007).

PCSI's, financial wherewithal are crucial to determine whether PAI would have been able to construct its licenses, as it purports, absent the Commission's 800 MHz rebanding proceeding. The Commission also set for hearing the issue of whether PCSI and PAI have transferred *de facto* control to a convicted felon, Pendleton C. Waugh ("Waugh").<sup>25</sup> Methods of determining whether *de facto* transfer of control has occurred include examining who incurs financial obligations on behalf of the licensees and who has collected any revenues.<sup>26</sup> The Bureau submits that examining Respondents' tax returns is the most effective way to accurately discern who has incurred financial obligations on behalf of the licensees and who has collected its revenues.

22. For the reasons discussed above as well as in the Bureau's November 9, 2007 Motion for Ruling and in the Bureau's Motions to Compel, each of which is incorporated herein by reference, the Bureau respectfully requests that the Presiding Judge reject Respondents' claims in subpart F of the PCSI and Austin Responses and subpart G of the PAI Response,<sup>27</sup> overrule Respondents' objections, and compel them to submit responsive documents.

**G. Austin's Contentions Regarding Financial Obligations Must Be Rejected.**

23. In his Response, Austin asserts that his answer to the Bureau's Document Requests relating to financial obligations incurred by Austin on behalf of PCSI or PAI was complete.<sup>28</sup> In support of his assertion, Austin points to his statement that he never personally borrowed any money to give to PCSI or PAI, and never personally guaranteed any money borrowed by PCSI.

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<sup>25</sup> See *id.* at 13371-72, 13374-75, 13379-80, 13385.

<sup>26</sup> See *id.* at 13374 n.72.

<sup>27</sup> See Enforcement Bureau's Motion for Leave to File Motion for Ruling, Attachment A, at 2-3 (filed Nov. 9, 2007); PCSI Motion at 7-9; PAI Motion at 6-8; Austin Motion at 7-9.

24. Despite his argument to the contrary, Austin's answer is incomplete.

Austin stipulates that he had the authority to incur financial obligations on behalf of PAI and executed documents so binding the company. Notwithstanding the foregoing stipulation, Austin does not state that he has produced such documents. Given Austin's extremely broad general objections in response to every Document Request, the Bureau assumes that Austin has and continues to withhold the requested documents based on any of those general objections.<sup>29</sup> As the Bureau discussed in Section F, above, the issue of who has incurred financial obligations on behalf of PCSI and PAI is relevant to who controls these licensees. Accordingly, the requested documents are relevant to this proceeding.

25. For the foregoing reasons, the Bureau respectfully requests that the Presiding Judge reject the arguments in subpart G of Austin's Response, overrule his objections, and order him to produce responsive documents.

**H. The Bureau Properly Sought Documents That Waugh Might Have Executed.**

26. PAI asserts that the Bureau improperly sought to compel documents Waugh may have signed on behalf of PAI.<sup>30</sup> Although PAI states that Waugh never signed any binding instrument on behalf of PAI, the Bureau respectfully submits that it raised this issue in its Motions to Compel in case PAI was withholding any materials based on its general objections. Similar to Austin, PAI raised broad general objections in response to every Document Request. The Bureau seeks to ensure that PAI is not withholding anything on the basis of such objections. Accordingly, the Bureau

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<sup>28</sup> See Austin Response at 8.

<sup>29</sup> Austin objected generally to every Document Request, alleging to objecting documents already produced to the Bureau, on file with the Commission, and/or created post-designation (and potentially, privileged).

<sup>30</sup> See PAI Response at 7.

respectfully requests that the Presiding Judge reject the contentions in subpart F of PAI's Response, overrule its general objections, and compel it to produce responsive documents to the extent they exist.

**I. Conclusion**

27. In light of the foregoing, the Bureau respectfully requests that the Presiding Judge reject Respondents' contentions in their Responses, overrule their objections to the Bureau's Document Requests, and order Respondents to produce responsive documents immediately.

Respectfully submitted,  
Kris Anne Monteith  
Chief, Enforcement Bureau

A handwritten signature in black ink, consisting of a large, stylized 'G' followed by a horizontal line that curves upwards and to the right.

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March 17, 2008

**CERTIFICATE OF SERVICE**

Greg Vass, an Administrative Support Specialist in the Enforcement Bureau's Investigations and Hearings Division, certifies that he has, on this 17<sup>th</sup> day of March, 2008, sent by first class United States mail or electronic mail, as noted, copies of the foregoing "Enforcement Bureau's Consolidated Reply to Responses to Motions to Compel Production of Documents," to:

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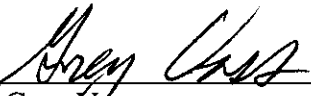
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